

2007 File Number: 07-00575-TC

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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF OREGON

9 GARY R. COUCH,)
10 Plaintiff,)
11 vs.)
12))
13 COMMISSIONER, SOCIAL SECURITY)
14 ADMINISTRATION)
15 Defendant.)
16) _____
17 Coffin, Magistrate Judge:

18 Before the court is defendant's Motion (#11) to Dismiss
19 Counts 2 and 3 of Plaintiff's Complaint. For the reasons that
20 follow, defendant's motion is granted.
21

22 BACKGROUND

23 Plaintiff challenges a final determination of the Social
24 Security Commissioner denying his claim for disability benefits,
25 seeking relief on three counts. In the first, plaintiff asserts
26 that the agency erred in denying his benefits claim; defendant
27 does not move to dismiss this count. In the second count,
28 plaintiff contends that defendant has "failed[,] neglected and

1 refused to respond favorably" to a FOIA request concerning
2 evidence related to the vocational expert's opinion testimony.
3 In plaintiff's third count, he contends that defendant violated
4 his Fifth Amendment right to substantive due process, "and/or"
5 his Ninth Amendment right "to a government that is honest in fact
6 and reasonably competent," by "pretending to or actually relying
7 on" unreliable vocational expert testimony. Defendant argues
8 that the court should dismiss count two because subject matter
9 jurisdiction in this court is lacking, and count three should be
10 dismissed for failure to state a claim. Defendant's arguments
11 are well-taken.

12 ANALYSIS

13 Count Two – FOIA Violation

14 Plaintiff's counsel submitted a FOIA request for all
15 documents and correspondence "discussing the number of jobs issue
16 that arises at step 5 of sequential evaluation in disability
17 claims" involving his client. Def. Ex. A. Ethel Burrows, SSA
18 Office of Public Disclosure Division Director, contacted
19 plaintiff's counsel in order to clarify the types of documents
20 that plaintiff was seeking. Burrows Declaration. Burrows was
21 informed that the FOIA request was made at the same time
22 plaintiff's counsel submitted a request for review to the Appeals
23 Council. Burrows Declaration. Burrows informed plaintiff's
24 counsel's assistant that all SSA documents relating to the FOIA
25 request would be in plaintiff's claims file, and that plaintiff
26 should contact her concerning the request. Plaintiff's counsel
27 did not do so. Burrows Declaration.

28 Plaintiff also received a letter stating that the Office of

1 Appeals would send the relevant documents. Def. Ex. B. The
2 Office of Appeals Operations sent plaintiff copies of exhibits
3 and a tape of plaintiff's SSA benefits hearing before the
4 Administrative Law Judge. Def. Ex. C.

5 Plaintiff now alleges that SSA has failed to respond to his
6 request for information and correspondence "discussing the number
7 of jobs issue that arises at step 5 of sequential evaluation in
8 disability claims" involving his client. Plaintiff has not
9 alleged any facts to lay a foundation for this assertion; rather,
10 he alleges only that "[t]he defendants [sic] have failed,
11 neglected and refused to respond favorably" to plaintiff's
12 request. Complaint p. 2.

13 Jurisdiction of the district court for a FOIA claim is
14 predicated on the improper withholding of all or part of
15 requested records. 5 U.S.C. § 552(a)(4)(B); Kissinger v.
16 Reporters Committee for Freedom of the Press, 445 U.S. 136, 150
17 (1980) ("Judicial authority to devise remedies and enjoin
18 agencies can only be invoked, under the jurisdictional grant
19 conferred by § 552, if the agency has contravened all three
20 components of this obligation [i.e., wrongful withholding of
21 qualifying records].") (bracketed terms added). The court may
22 consider facts outside the complaint in determining whether it
23 has subject matter jurisdiction over a claim. Sammatino v.
24 United States, 255 F.3d 704, 708 n.3 (9th Cir. 2000). As noted
25 above, the record indicates that both the Office of Appeals and
26 Office of Public Disclosure responded to plaintiff's FOIA request
27 with responsive documents. The Declaration of Ethel Burrows and
28 correspondence from the Office of Appeals substantiate

1 defendant's contention that no documents responsive to the FOIA
2 request have been withheld. In light of plaintiff's failure to
3 allege any facts that lay a foundation for his claim that a FOIA
4 violation occurred, I am not satisfied that the predicate to
5 jurisdiction, e.g., that there has been an improper withholding
6 of responsive documents, exists in this case. Thus, I find that
7 this court lacks subject matter jurisdiction, and Count Two is
8 dismissed for that reason.

9 Even if plaintiff's bare assertion of a FOIA violation were
10 sufficient to confer jurisdiction on this court under 5 U.S.C. §
11 552, plaintiff's claim must be dismissed pursuant to Fed. R. Civ.
12 P. 12(b)(6) because it lacks any identification of particular
13 documents that have been allegedly withheld. Plaintiff's
14 assertion that defendant "failed[,] neglected and refused to
15 respond favorably" to his request for documents "discussing the
16 number of jobs issue that arises at step 5 of sequential
17 evaluation" does not provide not a sufficient description of
18 records that have been allegedly withheld. Rather, it bears a
19 closer resemblance to a simple legal contention that a FOIA
20 violation occurred. Thus, even if I were satisfied that there
21 were jurisdiction in this court to consider the matter, absent
22 any identification of improperly withheld documents, plaintiff's
23 claim would fail under Fed. R. Civ. P. 12(b)(6). See, e.g.,
24 Wrenn v. Derwinski, 791 F. Supp. 11, 14 (D.D.C. 1992), aff'd,
25 1993 WL 215228 (D.C. June 8, 1993) (where complaint "merely
26 asserts the legal conclusion that defendant has violated the
27 FOIA's provisions without alleging facts to support the claim
28 [and] Plaintiff does not identify the documents that he requested

1 and that the defendant refused to release . . . the complaint
2 fails to meet the requirement of "a short and plain statement of
3 the claim showing that the pleader is entitled to relief." Fed.
4 R. Civ. P. 8(a). Dismissal pursuant to Rule 12(b)(6) is
5 appropriate."); Brunwasser v. Jacob, 453 F. Supp. 567 (D. C. Pa.
6 1978), aff'd, 605 F.2d 1194 (3d Cir. 1979) (where "requests for
7 information pursuant to the Freedom of Information Act, 5 U.S.C.
8 § 552, fail to 'reasonably describe such records' as required by
9 subsection (a)(3) thereof . . . the portions of the complaint
10 seeking such relief will be dismissed, pursuant to Fed. R. Civ.
11 P. 12(b)(6), for failure to state a claim upon which relief can
12 be granted.").

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15 Count Three - Constitutional Violations

16 Count Three alleges:

17 On 6/15/05, the defendants caused a [sic] ALJ hearing
18 to occur on plaintiff's Social Security Disability
case.

19 On this occasion, plaintiff alleges on information
20 and belief, that defendants failed[,] neglected and
refused to uphold plaintiff's constitutional rights
as follows:

21 (a) By pretending to or actually relying on
22 Vocational Expert testimony about numbers of jobs
23 that defendants know or should know to be unreliable,
24 in violation of plaintiff's Fifth Amendment right to
substantive due process and/or plaintiff's Ninth
Amendment right to a government that is honest in
fact and reasonably competent at what it undertakes
25 to do."¹

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27

28 ¹There is no subsection (b) in Count Three of plaintiff's
complaint.

1 Complaint, 2-3.

2 Plaintiff first asserts that the ALJ's use of Vocational
3 Expert (VE) testimony violated his Fifth Amendment right to
4 substantive due process. Plaintiff apparently contests the VE's
5 estimation of the number of jobs existing in the national economy
6 for which plaintiff is eligible, which is used at step five of
7 the sequential evaluation of disability claims. Plaintiff's
8 claim lacks any merit. As an initial matter, plaintiff does not
9 offer the court any explanation of how his claim implicates the
10 liberty interests that the Due Process Clause has been construed
11 to protect, namely, fundamental rights deeply rooted in our
12 nation's history. See Washington v. Glucksberg, 521 U.S. 702,
13 721 (1997). Moreover, the Ninth Circuit has held unequivocally
14 that "[a]n ALJ may take administrative notice of any reliable job
15 information, including information provided by a VE." Bayliss v.
16 Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005) (citing Johnson v.
17 Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995)). And, as the
18 Commissioner argues, the record is devoid of any allegation that
19 plaintiff was deprived of an opportunity to counter the VE's
20 testimony or challenge its foundation. In sum, because plaintiff
21 fails to state a claim under the Fifth Amendment upon which
22 relief may be granted, this claim is dismissed.

23 Plaintiff next asserts that the Commissioner has violated
24 her "right to a government that is honest in fact and reasonably
25 competent at what it undertakes to do." Plaintiff's counsel
26 filed the self-same allegation in Romans v. Commissioner Social
27 Security Administration, Civ. No. 06-01331 (D. Or., May 16,
28 2007), which presented very similar facts to the case at bar. In

1 her decision on the Commissioner's motion to dismiss, Judge Aiken
2 held, "I do not find that plaintiff's assertion qualifies as a
3 'short and plain statement of the claim showing that the pleader
4 is entitled to relief' required under Fed. R. Civ. P. 8(a)(2)." That reasoning applies with equal force in this case. Moreover,
5 as Judge Aiken explained, "federal court jurisdiction exists only
6 if there is an actual case or controversy. Plaintiff's asserted
7 Ninth Amendment violation fails to state any such case or
8 controversy." Id. at 6. Plaintiff's claim under the Ninth
9 Amendment is dismissed.²

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12 CONCLUSION
13 Defendant's Motion (#11) to Dismiss Counts 2 and 3 of
14 Plaintiff's Complaint is granted.

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16 IT IS SO ORDERED.

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19 Dated this 9 day of August, 2007.

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22 THOMAS M. COFFIN
23 United States Magistrate Judge

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25 ²Furthermore, plaintiff's claims in Count Three are subject to
26 dismissal on sovereign immunity grounds, inasmuch as the only
27 defendant in this action is an individual, the Commissioner of the
28 Social Security Administration, sued for actions performed in his
professional capacity, resulting in alleged violations of
constitutional rights (as opposed to an alleged erroneous agency
decision). See FDIC v. Meyer, 510 U.S. 471, 475 (1994); Gilbert v.
DeGrossa, 756 F.2d 1455, 1458-59 (9th Cir. 1985).